Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-617

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JANET LIERENZ,
Petitioner,

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,
Respondents

On Petition For A Writ Of Certiorari To The Erie County Court of Appeals of Ohio

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

John F. Kirwan
Counsel of Record

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APPENDIX

Motion to Dismiss . . . . . APPENDIX A

Memorandum in Support of Motion to Dismiss . . APPENDIX B

Certificate to copy of paper on file
Probate Court - Huron County . . . . . APPENDIX C

Fiduciary's Final Account (Filed 8-13-90) . . . . . APPENDIX D

Entry setting Hearing and Ordering
Notice (filed 8-13-90) . . . . . APPENDIX E

Receipts and disbursements (Filed 8-13-90) . . . . APPENDIX F

Entry Approving and Settling Account
(Filed 9-28-90) . . . . . APPENDIX G

Ohio Revised Code 2109.35 . . . . . APPENDIX H

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

JANET LIERENZ	:	CASE NO. 88-CV-129
Plaintiff,	:	JUDGE ANN B. MASCHARI
-vs-	:	**MOTION TO DISMISS**
MAX BOWEN, et al.	:	John F. Kirwan Attorney for Defendants
Defendant	:	Reg. #: 0023924 189 E. Market Street
	:	Sandusky, Ohio 44870 (419) 626-1917

Now comes Defendant and respectfully moves this Court to dismiss Plaintiff's Complaint for the reasons set forth in the attached Memorandum.

Respectfully submitted,

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

CERTIFICATION

This is to certify that a copy of the foregoing Motion to Dismiss and Memorandum have been served upon Attorney for Plaintiff, K. Ronald Bailey, P. O. Box 830, Sandusky, Ohio 44870 by regular U. S. Mail this 15th day of January, 1992.

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

JANET LIERENZ	:	CASE NO. 88-CV-129
Plaintiff,	:	JUDGE ANN B. MASCHARI
-vs-	:	**MEMORANDUM**
MAX BOWEN, et al.	:	John F. Kirwan Attorney for Defendants
Defendant	:	Reg. #: 0023924 189 E. Market Street
	:	Sandusky, Ohio 44870 (419) 626-1917

Plaintiff's duties as the representative of the Estate of decedent were terminated on September 28, 1990. Paintiff in fact, signed the Final Accounting and her duties were terminated by the Huron County Probate Court, (see attached Judgment Entry of 9-29-91). No reservation of authority was provided to Plaintiff in her representative capacity to continue to represent the Estate of the decedent in this law suit.

ISSUE: Can the Plaintiff, as alleged representative of the Estate of the decedent, continue her claim where the Probate Court that appointed her has discharged her from her duties as Fiduciary?

The answer is "no." Plaintiff's right to suit in a representative capacity, only continues so long as she has such authority. Once her authority is terminated by the Probate Court, she likewise loses her authority.

O.R.C. 2109.35 Effect of Order Settling Account, provides in pertintent part:

> "The Order of the Probate Court upon the settlement of the Fiduciary's Account shall have the effect of a Judgement and may be vacated only as follows:
>
> In the Case at Bar, the Final Accounting shows that the Plaintiff, Fiduciary knew about her claim and showed it as -0-. This operates as a Judgement and can only be vacated for one

of the reasons set forth in 2109.35, none of which apply to the Case at Bar, and which, in any event, can only be done by the Probate Court of Huron County.

Further, Plaintiff's Final Accounting, a copy of which is attached, and which is the only accounting made to the Probate Court of Huron County, does not show any payout for any of the alleged wages due pursuant to the Contract marked Exhibit "A". Plaintiff further is not aware these wages were paid and knows in fact that the Estate did not pay these wages (see attached Deposition, PP. 23-24).

For the above reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed.

Respectfully submitted

/S/ John F. Kirwan

John F. Kirwan
Attorney for Defendants

APPENDIX B-2

THE COURT OF COMMON PLEAS
PROBATE DIVISION
HURON COUNTY, OHIO

CERTIFICATE TO COPY OF PAPER ON FILE

I, the undersigned, Judge of the Court of Common Pleas, Probate Division within and for said County, and in whose custody the **Files, Journals and Records** of said Court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the original fiduciary's account and entry approving and settling account in the estate of Karl R. Lierenz Case Number 86-30312 Docker Number 49 Page 495.

now on file in said Court, that it has been compared by me with said original documents, and that it is a true and corect copy thereof. **IN TESTIMONY WHEREOF,** I hereunto subscribe my name officially, and affix the seal of said Court, at the Courthouse in Norwalk in said County, this 15th day of January, 1992.

THOMAS E. HEYDINGER, Judge

/S/ Patricia J. Burr

Deputy Clerk

APPENDIX C-1

PROBATE COURT OF HURON COUNTY, OHIO

ESTATE OF KARL R. LIERENZ, DECEASED
Case No. 86-30312, Docket 49, Page 495

FIDUCIARY'S ACCOUNT

[For Executors and all Administrators]

The Fiduciary offers an account of his trust, given below and on the attached itemized statement of receipt and disbursements, and accompanying vouchers. The fiduciary says that to his knowledge the account is correct and asks that it be approved and settled.

[Check one of the following four paragraphs]

☐ This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

☐ This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

☐ This is a distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

☒ This is a final and distributive account, and the fiduciary asks to be discharged from her trust upon its approval and settlement.

[Complete if this is a partial account, or if one or more accounts have previously been filed in the estate. The period of this account is from

_____ to _____

APPENDIX D-1

This account is recapitulated as follows:

RECEIPTS

Personal property of decedent [not sold]	
23, 255, 21 ± 42, 370.00 =	$ 65,625.21
Proceeds from sale of personal property	N/A
Real estate of decedent [not sold]	N/A
Proceeds from sale of real estate	N/A
Income	N/A
Other receipts advanced by Janet Lierenz,	
Debt Assumed	63,049.64
Total receipts	$ 128,674.85

DISBURSEMENTS

Fiduciary fees [this accounting period]	-0-
Attorney fees [this accounting period]	2,422.73
Other administration costs and expenses	
Court Costs	86.99
Debts and claims against estate	82,890.64
	85,420.36
Ohio and federal estate taxes	-0-
Personal property distributed in kind	42,370.00
Real property transferred	N/A
Other distributions to beneficiaries, cash	904.49
Other disbursements	-0-
Total disbursements	$ 128,674.85

BALANCE REMAINING IN FIDUCIARY'S HANDS -0-

/S/ Janet Lierenz
Fiduciary Janet Lierenz

ENTRY SETTING HEARING AND ORDERING NOTICE

The court sets September 28, 1990 at 10:00 o'clock A.M. as the date and time for hearing the above account, and orders notice of the hearing to be given as provided by law and the Rules of Civil Procedure.

August 13, 1990

/S/ Thomas E. Heydinger
Probate Judge

PROBATE COURT OF HURON COUNTY, OHIO

Estate of Karl R. Lierenz, Deceased
Case No. 86-30312, Docket 49, Page 495

RECEIPTS AND DISBURSEMENTS

[Attach to fiduciary's account]

Following is an itemized statement of receipts and disbursements by the fiduciary in the administration of his trust.

Item	Voucher No.	Value or Amount Collected	Value or Amount
Accounts Receivable:		$	$
Certainteed, Rt. 250 N.,	300		
Milan, OH	8200	8,500.00	8,500.00
Celotex, P.O. Box 286,	900		
Port Clinton, OH	1100	-0-	2,000.00
Modified Concrete Suppliers			
140 S. Neal Ave., Indianapolis, IN		-0-	200.00
Joe Hammersmith, 1405 Kingsway			
West Lake, OH 44145		-0-	260.00
Matte Linder, Zenobia Road,			
Norwalk, OH		-0-	294.30
Marlene Draper, Zenobia Road			
Norwalk, OH		-0-	438.34
Pete Brummitt		-0-	370.00
Don Wallace, 643 Sunnyside,			
Vermilion, OH		1,000.00	1,370.25
Crown Motel, Rt. 250 N.,			
Milan, OH		-0-	30,000.00
George Lierenz, 111 Norwood,			
Norwalk, OH		10,416.00	10,416.00

Item	Voucher No.	Value or Amount Collected	Value or Amount
Accounts Receivable:		$	$
Keith O'Dell, 2265 St. Rt. 13 S., Greenwich, OH		3,339.21	4,000.00
TOTAL		23,255.21	57,848.89
Accounts Collected			-23,255.21
Accounts Not Collectible			34,593.68

APPENDIX F-2

Item Tangible Personal Property	Voucher No.	Value or Amount	Value or Amount
1974 Mac Tractor and 1946 Rogers flat bed trailer			$ 1,120
Hand and Power Tools			700
Hester 317			275
Snow Blower 441			100
Rotary Hammer 825/Scoup			350
1973 Ford Dump Truck			2,500
Jack Hammer 862, $400 2/motor 150			550
Mag Float			100
Small Tools			100
Hilti Hammer			500
1982 Ford Pick-up Truck			3,275
1985 Ford Pick-up			5,800
Grinders (2)			100
Engine Crane			50
Air Compressor			400
Duetz Tractor, plows & snow blower			6,000
J. D. Loader			18,000
Post Hole Digger			300
Cut Off Saw			200
Portable Welders (2)			1,200
Parts Cleaner			150
Shop Air Compressor			600
			42,370

/S/ Janet Lierenz

Fiduciary

Janet Lierenz

APPENDIX F-3

PROBATE COURT OF HURON COUNTY, OHIO

ESTATE OF Karl R. Lierenz, Deceased
Case No. 86-30312, Docket 49, Page 495

ENTRY APPROVING AND SETTLING ACCOUNT

Upon hearing the account of the fiduciary, filed in this court on August 13, 1990, the court finds that:

The fiduciary has administered the estate lawfully and in accord with his powers;

[Check whichever of the following are applicable]

☐ The estate has been fully administered, except for final distribution to the beneficiaries;

☒ The estate has been fully administered and the assets have been distributed in accord with law and the applicable instruments governing distribution;

☒ The events have occured after which the Court may approve and settle a final account.

The account is therefore approved and settled.

[Check if applicable] - ☒ The fiduciary is discharged from his trust.

September 28, 1990 — Date

/S/ Thomas E. Heydinger — Probate Judge

APPENDIX G-1

2109.35 Effect of order settling account

The order of the Probate Court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) The order may be vacated for fraud upon the court's own order, if the motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file the motion at any time within one year after the removal of the legal disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of the legal disability. If the death of any person occurs during the period within which he could have filed the motion, his administrator or executor may file it within one year after the person's death.

(B) The order may be vacated for good cause shown, other than fraud upon motion of any person affected by the order who was not a party to the proceeding in which the order was made and who had no knowledge of the proceeding in time to appear in it; provided that, if the account settled by the order is included and specified in the notice to that person of the proceeding in which a subsequent account is settled, the right of that person to vacate the order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding in which the order was made if that person was served with notice of the hearing on the account in accordance with section 2109.33 of the Revised Code, waived the notice, consented to the approval of the account, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of that proceeding shall be deemed to have been a party to that proceeding unless he was represented in it as provided in section

2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with this division, if the motion to vacate the order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the three-year period shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of that period.

(C) The order may be vacated for good cause shown, other than fraud, upon motion of any person affected by the order who was a party to the proceeding in which the order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if the motion is filed within one year after that person acquires knowledge of the proceeding and, in any event, within three years after the order is made. The person shall establish to the satisfaction of the Court that he had no knowledge of the proceeding in time to appear in it.

(D) The Order may be vacated for good cause shown upon motion of the fiduciary, if the motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining of those items. The person filing a motion to vacate an order settling an account, or another person the court may designate, shall cause notice of the hearing on the motion to be served upon all interested parties who may be adversely affected by an order of the court granting the motion.

An order settling an account shall not be vacated unless the

court determines that there is good cause for doing so, and the burden of proving good cause shall be upon the complaining party.

The vacation of an order settling an account, made after notice given in the manner provided in section 2109.32 or 2109.33 of the Revised Code, shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith; provided that, if the fiduciary has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after vacation of the order, against any distributee benefiting from the sale, lease, or encumbrance to the extent of the amount received by that distributee on distribution of the estate or trust, or if any heir, devisee, or distributee has effected any such sale, lease, or encumbrance, any person prejudiced by it may proceed, after the vacation of the order, against that heir, devisee, or distributee, to the extent of the value at the time of alienation of the property aliened by him, with legal interest.